Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-538

In The
Supreme Court of the United States
October Term, 1985

MEDFORD ASSEMBLY OF GOD,

Petitioner,

v.

CITY OF MEDFORD, OREGON,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the free-exercise clause of the First Amendment require a City to exempt any parochial school located in the church building from a requirement for a conditional use permit under a zoning regulation governing the siting of all public and private school facilities?

2. Does a single instance of non-enforcement of such a regulation against a parochial school—for rational, non-suspect motives—entitle all other parochial schools to object to enforcement against them on equal protection grounds?

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, except for the following inaccuracies and omissions:

1. Petitioner states that "For practical, financial, and philosophical reasons, the school could not survive off the church premises." Petitioner also states that "The sixteen students in the church school have a negligible land use impact, if any, when compared to the permitted church use" (Pet. 5). These are mere conclusions of an argumentative nature. No such findings were made by any tribunal below.

2. Petitioner states that the Medford City Council adopted Resolution No. 4541 on January 21, 1981. The actual date of adoption was January 21, 1982. (The correct date appears at the end of the document reproduced in Petitioner's appendix at 51a.)

3. While Respondent does not question Petitioner's statement that its school is "an integral and inseparable religious ministry of the church" (Pet. 5), it should also be noted that the beliefs of the church do not require members to send their children to the church school. (App. 1.)

4. Petitioner's is not the only church school in Medford required to have a conditional use permit. Thirteen other churches in Medford have schools on their church premises. Nine of these have conditional use permits granted by the city. Three are legal nonconforming uses. The other is the Open Bible Church mentioned in Resolutions No. 3950, 4108 and 4541. *See opinion below*, footnote 5. (Pet. 11a).

5. The church conceded that obtaining a conditional use permit "would not change our curriculum or quality of our operation at all" (App. 4).

REASONS FOR DENYING THE WRIT

I. There is no significant conflict in the decisions of state courts of last resort.

Petitioner attempts to show a conflict between the courts of New Hampshire and Washington, said to support Petitioner, versus Alaska and Oregon. Close examination of the issues and holdings in these cases does not reveal a serious conflict.

City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978) was not decided on constitutional grounds. The issue was whether a zoning ordinance which allowed "facilities usually connected with a church" also allowed a church school without a special exception. The New Hampshire court held that a school was a facility usually connected with a church, largely for historical reasons. The court pointed out that education was a responsibility shouldered by churches long before the states began operating public schools, 382 A.2d 377, 379. While the possibility of a First Amendment problem was a factor influencing the interpretation of the ordinance, the New Hampshire court did not hold that a different interpretation would have been unconstitutional.

Unlike the Concord ordinance, the Medford ordinance specifically makes schools a conditional use. Thus, the Oregon court did not have to determine if a school is usually connected with a church. *Medford Assembly of God v. City of Medford*, 72 Or. App. 333, 335, 695 P.2d 1379 (1985). Since the Medford ordinance as interpreted by the Oregon court does not require the city authorities to define the limits of religious activities, it does not present the same potential for infringement of free-exercise rights

as the New Hampshire court found in the Concord ordinance. *See also Damascus Comm. Church v. Clackamas Co.*, 45 Or. App. 1065, 1072, 610 P.2d 273, *rev. denied* (1980), *app. dismissed* 450 U.S. 902 (1981).

The other case relied on by Petitioner as evidence of conflict, *City of Sumner v. First Baptist Church*, 97 Wn.2d 1, 639 P.2d 1358 (1982), also fails to present a direct conflict with the Oregon decisions. The *Sumner* case did not hold that the City of Sumner's special use permit requirement violated the free-exercise clause. The case was remanded to the trial court for further proceedings. On remand, it appears that the city would be required to justify its denial of the special use permit sought by the church and the trial court would have to "balance the interests of the parties". *Sumner, supra*, 639 P.2d 1358, 1362. We do not know the outcome of the balancing.

The City of Medford has not denied Petitioner a conditional use permit for its school. The church has never applied for the permit, because it claims it should be totally exempt from the permit requirement. There is no reason to believe a permit would be denied if the church applied for it. The city has invited the church to apply (Pet. 52a). Naturally, denial of a permit calls for stricter scrutiny than a claim that a permit requirement is unconstitutional. *See Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1298 (Alaska 1982).

It also should be noted that the *Sumner* court was divided. Four justices signed the opinion of the court. One concurred separately. Two concurred in the result only. Two dissented. Only five of the nine members of the Washington court agreed with the "rigorous stand-

ards suggested by the majority". 639 P.2d 1358, 1366 (concurring opinion of Justice Williams).

The *Concord* and *Sumner* cases do not present a direct conflict with the Oregon and Alaska decisions on free exercise of religion. While there is some divergence in the approach taken by these state courts, it has not been shown that there is a serious national problem in dealing with zoning of church schools. Furthermore, the Oregon decisions are consistent with decisions of the federal courts in similar cases (*See infra* Sec. IV). Certiorari is granted only for "special and important reasons". The conflict, if any, does not rise to that level.

II. The Oregon Court of Appeals has not decided a constitutional issue of such importance to justify review by this court.

The constitutional issue in this case is not significantly different from that raised in *Damascus Comm. Church v. Clackamas Co., supra,* in which this Court dismissed an appeal for want of a substantial federal question. In 1959 this Court likewise dismissed an appeal in a case upholding a city council denial of a "special use" permit (same as "conditional use" permit) to construct a church in a residential zone. *Jehovah's Witnesses v. Mullen,* 214 Or. 281, 330 P.2d 5, 74 A.L.R.2d 347 (1958), *app. dismissed* 359 U.S. 436 (1959).

Petitioner's resurrection of President Madison's veto of the church incorporation bill adds no substance to the petition. It is one thing for the legislature to create a religious society and prescribe rules for its governance and yet another to grant a church permission to make a particular use of its land. The suggestion that the grant-

ing of a conditional use permit would amount to an establishment of religion is absurd, to say the least. The permit requirement easily passes the establishment clause test enunciated by this Court. The test requires that the law must (1) have a secular purpose, (2) have no primary effect of advancing religion, and (3) not create excessive entanglement between church and state. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The ordinance's purpose is to regulate the siting of public and private schools—a clearly secular purpose. The granting of a permit would advance religion only incidentally, if at all. The decision on the permit is based on non-religious land use concerns. City officials are not otherwise involved in the operation of the church. Therefore, there is no significant entanglement. Not only is the establishment clause argument clearly without merit, it also was not raised in the state court. This foray into history does not demonstrate that the Oregon court decided a novel and important question of federal constitutional law.

Petitioner claims that the number of churches with on-premise schools is growing rapidly and that cases similar to this one "will arise in many more states". However, Petitioner offers no evidence to support this assertion. Perhaps this is nothing more than an indication that the Concerned Women for America Education & Legal Defense Foundation intends to foster such litigation. If more such cases do arise, the Court will have the benefit of further exploration of the issues by other state and federal courts. At this time, there is no urgent need for consideration of the church school zoning issues by this Court.

III. The First Amendment issue as presented is not ripe for decision.

The present case involves a recently-started school which few members' children attend, attendance not being required by the tenets of the faith. The church has not even applied for a permit. If the permit were applied for and granted, there would be no controversy. There is no reason to believe that the church could not obtain what it desires simply by exhausting its administrative remedies. Even if the permit were ultimately denied, it would not prevent the church from applying for and receiving a permit for a school in a different location. After all, nine other church schools in Medford have applied for and received conditional use permits. The record does not indicate that any have ever been denied.

As recently as last term, this Court has indicated its reluctance to review certain cases involving the application of land use regulations until all administrative remedies have been exhausted. *Williamson County Regional Planning Commission v. Hamilton Bank*, — U.S. —, 53 U.S.L.W. 4969 (1985). In *Williamson*, the Court indicated that Fifth Amendment "taking" claims require examination of the economic impact of the government action compared with reasonable investor expectations. The court found that

> Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. — U.S. —, 53 U.S.L.W. at 4974.

A similar problem is presented here. Petitioner asks the Court to *assume* that a permit would be denied without any

compelling state interest to justify the denial. It is simply impossible to tell if a permit denial would be justified under this standard unless Petitioner applies for the permit and gives the city an opportunity to consider the application on its merits. If certiorari is granted, the Court should not go beyond consideration of the facial validity of the permit requirement. The particular circumstances of Petitioner's church and school should not be considered by this Court unless and until a permit application is filed and the city has determined how the ordinance will be applied.

IV. The case was correctly decided and is consistent with prior decisions of this court and other federal courts.

A. Free Exercise

Section 10-165(2)(c) of the Medford zoning ordinance classifies Petitioner's church as a permitted use in the R-4 zoning district. Section 10-165(4) classifies "public, private and parochial schools" as conditional uses in the R-4 zone Section 10-235 of the zoning ordinance provides that conditional uses may be permitted subject to the granting of a conditional use permit by the planning commission. The latter section expresses the city council's legislative judgment that:

> Because of their unusual characteristics, or the special characteristics of the area in which they are to be located, conditional uses require special consideration so that they may be properly located with respect to the objectives of this code and their effect on surrounding properties.

Section 10-235, Medford Code.

The Medford City Council, the Oregon Land use Board of Appeals and the Oregon Court of Appeals have all in-

terpreted these ordinance provisions to require a conditional use permit for a church school, even though the school is located in the church building in the R-4 zone where "churches" are a permitted use. Petitioner has refused to apply for a conditional use permit for its school and contends that the permit requirement violates the free-exercise clause of the First Amendment. The essence of Petitioner's argument is that, because the school is on the church premises and is an integral part of the ministry of the church, the permit requirement imposes a heavy burden on its religious practices, unjustified by any compelling state interest.

Respondent does not question the church's contention that the school is an integral part of the ministry of the church. It is clear that the school is one means used by the church to propagate the faith. However, there is no evidence in the record that the tenets of Petitioner's faith require that the school be located on the church premises. The church simply finds it convenient to have the school there. The church has an average Sunday attendance of 700 persons, but the school has only 16 students. This disparity is apparently explained by the fact that the beliefs of the church do not require its members to send their children to the church school and that the church has no quarrel with the public school system.

Petitioner does not appear to be concerned about the *process* of applying for a conditional use permit and there is no reason to believe that it would not receive fair and equitable treatment. Since the city has granted nine CUPs for church schools and denied none, the church would seem to have nothing to fear. Since the church wouldn't apply for the permit, the city has not had an

opportunity to properly apply the factors governing issuance of the permit to this particular situation. Petitioner can only contend that the mere *possibility* of denial of the permit, no matter what land use problems might surface in the permit process, is an impermissible burden on its First Amendment rights.

With the foregoing summary of the positions of the parties, it is plainly seen that the First Amendment issue in this case is really quite narrow. The city is not trying to tell the church what to teach or what kind of ministries it should have. The city is merely trying to allow schools and churches in residential neighborhoods while at the same time retaining some control to allow it to protect the neighborhood from a use that may be incompatible. Thus it is clear that the ordinance passes the "threshold test", because it has a secular purpose and effect and regulates conduct only, not beliefs. Any effect on religion is only an incident of the secular effect of regulating the siting of all schools. *Braunfield v. Brown,* 366 U.S. 599 (1961) (sustaining Sunday closing law challenged by an Orthodox Jew).

Beyond this threshold, the government interest must be balanced against the burden on religion. However, this balancing need not be difficult where a religion based exemption would clearly and substantially impair the government's policy objectives and the burden on religion is minor. *Braunfield v. Brown, supra, Johnson v. Robison,* 415 U.S. 361 (1974) (sustaining denial of veterans benefits to conscientious objector who performed alternative civilian service). On the other hand, a law which compels people, under threat of criminal penalties or life-

threatening economic sanctions, to perform acts directly contrary to fundamental beliefs can be justified only if the government can demonstrate a very strong interest in taking such action. *Wisconsin v. Yoder,* 406 U.S. 205 (1972), *Sherbert v. Verner,* 374 U.S. 398 (1963), *Thomas v. Review Board,* 450 U.S. 707 (1981).

In this case, the burden of the conditional use permit on the practice of religious beliefs is light. The church believes in parochial education as a desirable thing, not a necessity for all of its members' children. It is convenient, but not necessary, to have the school on church premises rather than elsewhere. Certainly the church believes very strongly that its rights are violated by the permit requirement, but this must be viewed as a political and legal opinion rather than a religious belief.

The burden on the city of granting a religion-based exemption is intolerable if the city is to preserve its legislative objectives. There can be no doubt that most, if not all, churches that operate parochial schools regard them as an integral part of the ministry of the church. *See, e.g., St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772 (1981).

Thus, in pursuing its objective of regulating the siting of schools, the city would (if such exemptions are required) have to assume that any church at any time could operate a parochial school of any size on the church premises. As the city planning director pointed out (App. 9) this would leave the city with a difficult policy choice. It would have to either abandon the control of siting of schools or enact greater restrictions on the siting

of all churches. In fact, the city's dilemma would be even worse, for there is no principled way to distinguish between a request for a religion based exemption for a "school ministry" and a request for exemption for any other activity which a church might believe it should conduct on its church premises. For example, Texas courts have considered and rejected claims that certain church "ministries" were "accessory uses" of church property: *Fountain Gate Ministries v. City of Plano,* 654 S.W.2d 841 (Tex. Civ. App. 1983) (college adjacent to a church), *Heard v. City of Dallas,* 456 S.W.2d 440 (Tex. Civ. App. 1970) (kindergarten in a rectory), *Coe v. City of Dallas,* 266 S.W.2d 181 (Tex. Civ. App. 1953) (healing center). Churches are commonly known to operate hospitals, radio and television stations and many other diverse types of activities as part of their ministry. If a religion-based exemption is constitutionally required for a school ministry, there can be no doubt that churches everywhere will be entitled to religion-based exemptions for these other activities.

The situation presented in this case is similar to that in *United States v. Lee,* 455 U.S. 252 (1982) where the Court said:

> There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system would not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that vio-

> lates their religious belief. (Citations omitted.) Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

455 U.S. 252, 260. Likewise, the zoning scheme could not function if churches are entitled to religion based exemptions for all their "ministries", regardless of the zoning regulations for the area where the churches are located. The protection of its neighborhoods through zoning has long been recognized as a vital interest of local government. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Therefore, it is clear that the balance should tip in favor of the city in this case.

Recently, two federal circuit courts have upheld local zoning ordinances excluding churches from residential areas against free exercise clause challenges. *Lakewood Cong. of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303 (6th Cir. 1983), *cert. denied* — U.S. —, 52 U.S. L.W. 3262 (1983), *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Circuit 1983), *cert. denied* — U.S. —, 53 U.S. L.W. 3236 (1984). Both these cases involved much greater restrictions on churches than Medford imposes through its requirement for a conditional use permit. In *Grosz,* the court found support for its decision in the Supreme Court dismissal for want of a substantial federal question in *Corporation of the Presiding Bishop v. City of Porterville,* 38 U.S. 805 (1949), where the state court had held that churches may be excluded from residential areas. In a later case, *American Communications Ass'n. v. Douds,* 339 U.S. 382, 397 (1950), the *Porterville* case was explained as follows:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

Petitioner cites several cases as authority for its assertion that a church school cannot be regulated separately from its parent church. Examination of these cases reveals that this Court has not adopted such a rule. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Grand Rapids v. Ball*, — U.S. —, 87 L.Ed.2d 267 (1985) were establishment clause cases dealing with government aid to parochial schools. In *Lemon* the Court acknowledged that "building and zoning regulations" are examples of "necessary and permissible contacts" between church and state. 403 U.S. at 614. The other cases relied on by Petitioner, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) were statutory interpretation cases not directly involving First Amendment issues.

Petitioner also relies on *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which struck down a zoning ordinance that totally excluded all forms of live entertainment from the borough. The ordinance was held to be an unreasonable restriction on free speech because it totally banned a legitimate form of expression, unjustified by any substantial government interest. The Medford ordinance

bears no resemblance to that of Mt. Ephraim. This Court has held that a law may impose restrictions on the time, place and manner of the exercise of First Amendment rights if the restrictions (1) are not based on the content or subject matter of the speech, (2) serve a significant governmental interest, and (3) leave open alternative forums for communication. *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981), *Grayned v. City of Rockford,* 408 U.S. 104 (1972). Medford's zoning regulation is not based on content of speech. Church schools are regulated if they are the functional equivalent of a public school, regardless of the doctrines they teach. A distinction between a public school or its equivalent and a Sunday school is not a regulation of content of speech. The ordinance serves an important governmental interest by assuring that operation of a school in a residential area will not adversely affect the area. There is no absolute prohibition of or undue restriction of the exercise of protected rights. The evidence does not show that the ordinance has had the effect of severely restricting locations for parochial schools. Thus the ordinance qualifies as a reasonable regulation of the time, place and manner of the exercise of Petitioner's rights. Petitioner seems to be upset that the Oregon court did not discuss its free exercise arguments at length. This is no reason for granting a writ of certiorari in a case where the result reached is plainly correct.

B. Equal Protection

Before Petitioner's case came to its attention, the Medford City Council had occasion to consider a similar appeal from the Open Bible Church. Misled by a lower

court decision in another part of the state, the council erroneously granted an exemption to the Open Bible Church via an incorrect interpretation of its ordinance. This council action was never appealed, but the lower court decision relied upon was appealed, and was reversed. *Damascus Community Church v. Clackamas Co.*, 45 Or.App. 1065, 610 P.2d 272, *rev. denied* (1980), *App. dismissed* 450 U.S. 902 (1981). This led the council to resolve not to make the same mistake *again*, though it let stand the exemption granted to the Open Bible Church. This sequence of events is set forth in detail in the appendix to the Petition. Petitioner argues that this single prior instance of non-enforcement of the conditional use permit requirement precludes the city from enforcing it against Petitioner, and thus necessarily precludes enforcement against any other church.

Petitioner's argument is at odds with the decisions of this court concerning selective enforcement. In *Oyler v. Boles*, 368 U.S. 448 (1968), the Court sustained a conviction under a habitual offender statute against a selective enforcement challenge. The Court found that:

> Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a denial of equal protection were not alleged.

368 U.S. at 456.

Just last term, the Court upheld selective prosecution of draft resisters, finding neither a discriminatory effect

nor discriminatory intent. *Wayte v. United States,* — U.S. —, 53 U.S.L.W. 4319 (1985). In this case, Petitioner has failed to present any evidence of arbitrary discrimination. Not wishing to revoke an exemption granted in a quasi-judicial proceeding, the council had a rational, non-discriminatory basis for treating its prior action as *res judicata*—even though the exemption clearly had been granted in error. Even if this decision is subjected to the "strict scrutiny" that Petitioner requests, it is nevertheless a reasonable choice. The Oregon Court of Appeals found that the City had a significant governmental interest in acting as it did:

> The city, nevertheless, has a continuing interest in encouraging proponents and opponents of zoning actions to use the ordinance's declaratory interpretation procedure. That interest is served by the city's adherence to Resolution No. 3950 as it applies to the particular church whose invocation of the procedure resulted in the adoption of the resolution; the city has no comparable interest in misapplying its ordinance in accordance with Resolution No. 3950 to another church that did not intiate the declaratory proceeding that culminated in that resolution and which later initiated the declaratory proceeding involved in this appeal after the city had disavowed the interpretation contained in Resolution No. 3950.

Medford Assembly of God v. City of Medford, 72 Or.App. 333, 340 (1985). The court below further stated that:

> We assume only for purposes of discussion that some constitutionally cognizable classification is involved here. However, it is just as arguable that all that is involved are different resolutions of different controversies under different legal standards that were understood to be controlling at the time of the decisions. Both the adoption of Resolution No. 3950 and of the later resolution repeating it could have been appealed,

> to LUBA. (Citation omitted.) Had either resolution been tested in that way, the ordinance presumably would have applied in the same way to both organizations or a legal, as opposed to rational, basis for differentiating between them would have been enunciated. Viewed in that perspective, the difference in treatment here might be better characterized as two applications of the ordinance—one of which was arguably erroneous and appealable—than as a classification giving rise to equal privileges and equal protection analysis.

Id. at 340, footnote 7. Though the court below felt that "strict scrutiny" did not apply, it is clear from the foregoing that it did scrutinize the city's actions very carefully. It is difficult to see how the "strict scrutiny" test could require more than this. By any standard, the distinction between the two churches is justified.

CONCLUSION

Since there is no significant conflict among state courts and the Oregon decision clearly comports with federal constitutional standards, the writ should be denied.

Respectfully submitted,

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Date: November 15, 1985

APPENDIX

TESTIMONY OF DAVID HUNT ON BEHALF OF MEDFORD ASSEMBLY OF GOD CHURCH AT THE MEDFORD CITY COUNCIL HEARING ON JANUARY 7, 1982.

HUNT: Mr. President and members of the council. My name is David Hunt and I reside at 2917 Comice Drive in the southeast portion of Medford and I presently am serving in a position on the church board. I am secretary of that board. I also serve in the capacity of chairman of New Dimension Advisory Board, that makes up the board of the school and serves in an advisory position to our church board. I don't know if I can not duplicate as I have memorized it so I don't know if I can—(laughter) We really do feel though the church is obligated to provide quality education that is built upon the foundation of Biblical content. We really feel that being able to do this that we have a real positive force in this community and the result that the students will have when they go through the schooling and the educational material that we offer in our ministry of this school. We feel that this school, New Dimension which includes the day care and kindergarten, preschool, first, second and third grades, that children that go through this educational system will come out of it with values that are positive forces within this community. I would like to make that point. Christian values learned is a real positive force in our community. I will make it clear that the church is not fighting against the public school system. Many of our church members have children enrolled in the public school system and it is a fine system and we are not fighting that—that battle

at all, we believe in it also. There is, however, a difference in educational systems. In curriculum that we use that is Bible-based, values that are taught are based upon the values that you find in Scripture. Another positive thing that we feel is in our educational system is the student-teacher ratio. As was mentioned, third grade containing three students, the student-teacher ratio is very low as compared to the public schools. We feel that this is a real quality plus for our type of system.

So far mentioned tonight has been the different educational systems, public, private, parochial, church school. We would like to make it clear that we consider ourselves as a Christian church school and there are differences which have already been talked about. We feel real positive that the church in offering this ministry is offering a program of alternative education, very important and we feel that it is our obligation based upon the Bible and based upon the Scripture that we offer this as part of our ministry. I would also like to make a point of clarification here too, perhaps some of you believe that the buses that have caused such a controversy are used in the school. The buses are not used in New Dimension in any way. I would qualify that by saying that perhaps there was an outing to a park, they could be loaned to New Dimension. They are not served to bus students to New Dimension. Our school program is a tuition-supported and church-subsidized program. I would like to emphasize that because tuition alone does not pay for the program of New Dimension. It can only survive upon the subsidy part that the church also involves itself in financially.

Presently the New Dimension employes 11 persons. We have 6 full time people and we have 5 part time people.

Totally in this school year the most that we have had in our New Dimension, totally in all areas is 144 children. I would like to bring out a fact that that as compared with the school year of 1979-1980 is lower as we had a total of 152 children. I'll briefly give you a breakdown of where the students are within the school. If you add these totals up you will come up with more than the 144 and the reason for that is because some that are enrolled in day care and some that are enrolled in pre-school are the same students, different hours of the day. We have 103 in day care, we have 52 enrolled in preschool, we have 15 in kindergarten, we have 16 students enrolled in our elementary school. In summary, in closing I would just like to say that we really believe that our purpose is to build upon the foundation of Biblical context, Biblical context, walls of quality education. You each live in a home, you each have walls that provide some type of safety to you. We fell that in our church program that we can be a wall of quality education to serve as a protection to the children we have who go out and serve and live in the community.

Any questions?

Yes.

Bill.

Mr. Hunt, do you believe that we as this government level have absolutely no interest whatsoever in your curriculum, in what you teach, how you teach it, how many students you have, so on and so forth and do you feel that a conditional use permit is a threat to the church's educational system?

HUNT: Well, that's more than one question. Let me see if I can cover it all, two questions. First of all, I be-

lieve that each member on the city council are very highly concerned about every area in this community and I think by and large the majority of the members of our church realize that and appreciate it. Secondly, regarding the conditional use permit—

This is in relation—in other words, the conditional use permit has absolutely nothing to do with the educational facilities, how you teach and what you teach in your church —do you feel it is in any way, shape or form a threat to your school system?

HUNT: Okay. I would say that the conditional use permit would not change our curriculum or quality of our operation at all. Do I feel threatened by a conditional use permit? I feel that by saying that we have been operating illegally from the onset is certainly a threat to our morals, our stated purpose in this community.

All right, thank you.

10-235. *Conditional Use Permits.*

(1) Purpose. In certain districts, conditional uses may be permitted subject to the granting of a conditional use permit. Because of their unusual characteristics, or the special characteristics of the area in which they are to be located, conditional uses require special consideration so that they may be properly located with respect to the objectives of this code and their effect on surrounding properties.

(2) Planning commission authority. The planning commission shall have the authority to approve, approve with conditions, disapprove, or revoke conditional use permits subject to the provisions of this section. Changes in use, expansion, or contraction of site area, or alteration of structures or uses classified as conditional and existing prior to the effective date of this code shall conform to all regulations pertaining to conditional uses.

(3) Application. A property owner or any interested person may make application for a conditional use permit which shall be made to the planning commission in the manner prescribed by the city. Such application shall be accompanied by a legal description of the property affected, site plans as set forth in Section 10-255(3a), and an application fee in the amount established by general resolution of the city council. Pending the adoption of such a resolution, the fee shall be $50.00. No part of the fee shall be refundable.

(4) Public hearings. Before a conditional use is permitted the proposed conditional use shall be considered by the planning commission at a public hearing. Notice of

said hearing shall be given as provided in Section 10-270 (2, 3, 4).

(5) Action by the commission. The planning commission may approve, approve with conditions, or disapprove the application for a conditional use permit. In permitting a conditional use the planning commission may impose, in addition to regulations and standards expressly specified in this code, other conditions found necessary to protect the best interests of the surrounding property or neighborhood, or the city as a whole. These conditions may include requirements increasing the required lot size or yard dimensions, increasing street widths, controlling the location and number of vehicular access points to the property, increasing the number of off-street parking or loading spaces required, limiting the number of signs, limiting the coverage or height or buildings because of obstructions to view and reduction of light and air to adjacent property, limiting or prohibiting openings in sides of buildings or structures or requiring screening and landscaping where necessary to reduce noise and glare and maintain the property in a character in keeping with the surrounding area, and requirements under which any future enlargement or alteration of the use shall be reviewed by the city and new conditions imposed. The planning commission may also require architectural approval for any conditional use in any district if it finds that such approval is necessary in any particular situation to accomplish the purposes and objectives of this code.

(a) In order to grant any conditional use, the planning commission must find that the establishment, maintenance, or operation of the use applied for will not, under the circumstances of the particular case, be detrimental to the health, safety, or general welfare of

persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property and improvements in the neighborhood or to the general welfare of the city.

(b) The planning commission shall render a decision within 60 days after the filing of the application. The decision of the planning commission shall be final unless appealed to the city council.

(c) A conditional use permit shall become void after one year after approval, or after such greater or lesser time as may be specified as a condition of approval, unless within that time the required building construction, alteration, or enlargement has been commenced an diligently pursued or, if no such construction, alteration, or enlargement is required, unless the permitted activity is being regularly conducted on the premises. The planning commission may extend the permit for a period of one year.

(6) Appeal. The applicant or any interested person may appeal a decision of the planning commission to the city council in the form prescribed by the city. The appeal procedures shall be as set forth in Section 10-270(9, 10).

(7) Effect. No building or other permit shall be issued in any case where a conditional use permit is required by the terms of this code until five days after the approval of the conditional use by the planning commission. An appeal from an action of the planning commission shall automatically stay the issuance of a building or other permit until such appeal has been completed.

(8) Violation of condition. The planning commission, on its own motion, may revoke any conditional use permit for noncompliance with conditions set forth in the granting of said permit after first holding a public hearing and giving notice of such hearing as provided in Section

10-280(3). The foregoing shall not be the exclusive remedy, and it shall be unlawful and punishable hereunder for any person to violate any condition imposed by a conditional use permit.

(9) Limittaion on new applications. In a case where an application is denied by the planning commission, or denied by the city counsel on appeal from the planning commission, unless specifically stated to be without prejudice, it shall not be eligible for resubmittal for the period of one year from the date of said denial unless, in the opinion of the planning commission, new evidence is submitted or conditions have changed to an extent that further consideration is warranted.

(10) Notification of action. The planning commission shall notify the applicant for a conditional use in writing of the planning commission's action within seven business days by postmark date after the decision has been rendered.

A PORTION OF THE TESTIMONY OF JAMES M. EISENHARD, CITY PLANNING DIRECTOR, AT THE CITY COUNCIL HEARING ON JANUARY 7, 1982.

EISENHARD: I think the general answer to that is that we feel, and the zoning ordinance recognizes, that a church in a traditional sense and a school have different land use impact and therefore we feel that by being able to regulate them separately we can help, in fact, help church schools to be good neighbors by making suggestions in the form of conditions at the time of permit review so that they don't become a problem in a neighborhood. If all churches, in fact, chose to have schools we would have a different kind of zoning ordinance and churches would be allowed in different places than they are allowed now and they wouldn't be allowed in some places where they are allowed now just as many other uses are not allowed in some places.